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IN THE

Supreme Court of the United States

OCTOBER TERM 1964

NO. [redacted] 34

J. R. FRANKEL, ET AL.,

Petitioners,

versus

FEDERAL POWER COMMISSION, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, THE UNITED GAS IMPROVEMENT COMPANY, LONG ISLAND LIGHTING COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, J. R. Frankel, et al.,[1] pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on August 14, 1964.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 335 F (2d) 1004, and is printed as Appendix B to the petition of The United Gas Improve-

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[1] Petitioners are J. R. Frankel, R. R. Frankel, L. R. Frankel, Mae Frankel Shalett, H. T. Shalett, and the Estate of Maurice Frankel, successors to Berkshire Oil Company.

ment Company, et al., No. 671, October Term, 1964, for a writ of certiorari to review the same judgment.[2] The opinions of the Federal Power Commission are reported at 30 F.P.C. 283 and 30 F.P.C. 682, and are printed in the Joint Appendix filed in the Court of Appeals, copies of which have been deposited with this Court by the Solicitor General (R. 550-93, 607-17).

JURISDICTION

The judgment of the Court of Appeals was entered on August 14, 1964. On September 3, 1964, petitioners applied for rehearing. On September 21, 1964, rehearing was denied. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission may lawfully order retroactive reduction of filed rates, and imposition of refunds based on such reduction, by means of a condition attached to a certificate of public convenience and necessity issued to a producer under Section 7 of the Natural Gas Act?

2. Whether a certificate of public convenience and necessity may lawfully issue to a producer who is totally unable and unwilling to make the sale purportedly authorized?

3. Whether there is sufficient evidentiary or legal support for the findings and inferences of the Court of Appeals to the effect that it was up to the successful producers to seek interim protective relief from a former order of the Federal Power Commission, and that exten-

[2] The opinion is also copied as an appendix to the respective petitions in Nos. 678 and 714.

sions of time would have protected the producers and would have been granted if requested?

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act, as amended (15 U.S.C. Sections 717-717w), are set forth in Appendix A, *infra*, pp. 1a, et seq.

STATEMENT

On August 30, 1957, petitioners' predecessors[3] applied (R. 5-11) to the Commission for a certificate covering a sale to Transcontinental Gas Pipe Line Corporation from a South Louisiana field under a gas sales contract dated August 12, 1957 (R. 2-4). After due hearing, such predecessors were granted a certificate, unconditioned as to price, by Opinion No. 315 dated September 4, 1958 (R. 12-30). Such certificate required prompt acceptance, which was done. On November 13, 1958, the gas sales contract was duly filed as a rate schedule (R. 2-5) as required by the Commission's regulations, and was duly accepted. On January 30, 1959, deliveries commenced.

The New York Public Service Commission and other distributor interests prosecuted an application for review to the Court of Appeals for the Third Circuit, and that Court affirmed. *United Gas Improvement Co. v. F.P.C.*, 269 F. (2) 865. On petition for certiorari, this Court reversed and remanded the case to the Third Circuit, with directions to remand to the Commission for reconsideration and redetermination in the light of CATCO.[4] *United*

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[3] Petitioners (together with Maurice Frankel, now deceased) were the sole stockholders of Berkshire Oil Company, and succeeded to its rights and obligations upon its dissolution. Berkshire had sold the properties in question to Continental Oil Company. Berkshire had acquired the properties from J. R. and R. R. Frankel, the original applicants.

[4] *Atlantic Ref. Co. v. Public Service Commission*, 360 U.S. 378.

Gas Improvement Co. v. F.P.C., 361 U.S. 195.

On January 10, 1962, the Commission issued an order (R. 395-401) without hearing, notifying the parties to the remanded proceedings for the first time that the Commission proposed to impose refund obligations on the producers. Thereafter, the matters were set for hearing (R. 423-425). At the hearing all evidence offered by petitioners to support their contract price was excluded (R. 238-245; 208), and, on December 7, 1962, the Presiding Examiner issued a decision (R. 490-536) which, among other things, required petitioners to refund to the pipe line, with interest, all amounts previously collected by petitioners' predecessors in excess of a specified base price, less than the contract price.[5] The Commission affirmed the Examiner's decision in all material respects by its Opinion No. 398, issued July 7, 1963 (R. 549-593).

Meanwhile, the then owner of the properties in question and holder of the certificate, Berkshire Oil Company, sold the properties, as of November 2, 1961, to Continental Oil Company (R. 568-9) who sought and obtained a certificate authorizing it to continue the sale (In the Matter of Continental Oil Company, F.P.C. Docket No. CI62-1508; *cf.* R. 542-544, 568-9). Berkshire Oil Company was dissolved, and petitioners, its former stockholders, were substituted as parties to the instant docket (R. 568-9). The attention of the Examiner and of the Commission was called to the fact that petitioners neither sought a certificate nor were able to perform its responsibilities (*Cf.* R. 568-9, 542-5).

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[5] The contract price was 21.5¢ per Mcf. *plus* tax reimbursement. The Opinion No. 398 price was 20¢ per Mcf. *inclusive* of tax reimbursement. Tax reimbursement amounted to 2.05¢ per Mcf.

After Opinion No. 398 was issued, petitioners asked and were denied (R. 607-617) rehearing. Petitioners then sought review before the Fifth Circuit Court of Appeals. That Court reversed the order of the Commission but, in the course of its opinion and decree, made the rulings herein complained of.

REASONS FOR GRANTING THE WRIT

The only quarrel which petitioners have with the decision below relates to its holding that the Commission has the power here to require refunds. In reaching this result the Court failed to give proper weight to the decisions of this Court on the same subject, failed to respect the legality of the rates on file, and gave to the former proceedings for review effect equivalent to a stay, although no stay was sought or granted, and, although the Natural Gas Act provides to the contrary.

I.

IN RECOGNIZING AN OBLIGATION TO MAKE REFUNDS THE DECISION BELOW IS IN CONFLICT WITH PRIOR DECISIONS OR OPINIONS OF THIS COURT AND IS CONTRARY TO THE NATURAL GAS ACT.

A. In the instant case, the sole and only effect of the Commission's "certificate" issued to petitioners is to order refunds. On its face, it orders reparations. In order to fix the level of the refunds, the Commission necessarily determined that the rates theretofore collected were too high. Both such determinations are beyond the power of the Commission. " * * * under the Act, the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those

'to be thereafter observed and in force.'" *F.P.C. v. Hope Natural Gas Co.*, 320 U.S. 591, 618. And see: *Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246; *T.I.M.E. v. United States*, 359 U.S. 464; *Hope Natural Gas Co. v. F.P.C.*, 134 F. (2d) 287 (C.A. 4th), rev'd on other grounds 320 U.S. 591.

The scheme of the Act has been well explained in this Court's decisions. *Cf. United Gas Pipe Line Company v. Mobile Gas Service Corp.*, 350 U.S. 332, 340-346; *United Gas Pipe Line Company v. Memphis Light, Gas & Water Div.*, 358 U.S. 103; *F.P.C. v. Hope Natural Gas Co., supra; Montana-Dakota Utilities Co. v. Northwestern Public Service Co., supra.* The Act authorizes the natural gas company to fix the initial rate. When filed, the initial rate becomes the only legal rate. It may be changed only in a proceeding under Section 5 of the Act (rate review) or under a proceeding under Section 4(e) (rate increase and review). In either instance the change is prospective, except that if a proposed rate increase is suspended, an obligation to refund that portion of the increase found to be excessive may be imposed in the event the natural gas company chooses to put the increased rate into effect. The only control permitted by the Act over initial rates is the power to impose, prospectively, a rate condition in the certificate, in which event a refund obligation may also be included as to rates thereafter to be collected. The only refunds lawfully imposed under the Act are those to which the natural gas company has consented, either by putting an increase into effect under Section 4(e) or by accepting a certificate containing a prospective condition under Section 7.

It is beyond question that in a Section 5 (or Section 4(e)) proceeding the Commission may not order retro-

spective refunds, or, for that matter, even determine the propriety of past rates—this because Congress designedly excluded any power of the Commission to correct past error retrospectively. To say that Congress intended that retroactive rate reductions of filed rates could be enforced by the Commission by the subterfuge of inserting a rate condition in a certificate is to say that reparations **can** be ordered and that the "filed rate" doctrine is a one-way street.

The significance of the instant reparations order is dramatized by the situation in which these petitioners find themselves. An unsought, unwanted and unacceptable "certificate", impossible of performance,[6] is thrust upon them. All that it could accomplish, if legal, is to order the repayment of past excessive rates. No exercise in semantics can change the character of such an order. Its results are "reparations", which the Commission is powerless to grant.

B. The importance of the proper resolution of this issue to the administration of the Natural Gas Act goes beyond the circumstances here. If the decision below is correct in holding that rates on file and collected at a time when unconditional permanent certificates are in effect may be ordered refunded, the so-called "filed rate doctrine" is effectively destroyed. Further, producers will be constrained not to make deliveries until all possibility of judicial attack has concluded—which, in this case, would mean that no gas would yet be moving in the line more than six years after the unconditional certificate was granted.

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[6] The certificate order authorizes "the sales and services proposed by * * * J. R. Frankel, et al., successor to Berkshire Oil Company, in the contract with Transco * * * " J. R. Frankel, et al., proposed no sale or service and were in no condition to perform.

II.

THE DECISION BELOW CONFLICTS WITH THE NATURAL GAS ACT IN ISSUING A CERTIFICATE TO ONE NOT ELIGIBLE.

Section 7(c) of the Act (15 U.S.C. Section 717f(c)) permits a certificate to be issued only if the applicant is a "natural gas company" and is "able and willing properly to do the acts and to perform the service proposed" and that the "proposed * * * sale * * * is or will be required by present or future public convenience and necessity * * * " Here, the facts are that petitioners propose no service or sale, are unable and unwilling to do any acts or perform any service, and there is no "sale" to be required by the public interest. Under the plain language of the statute a "certificate" may not be issued them.

III.

THE DECISION BELOW CONFLICTS WITH THE NATURAL GAS ACT IN INFERRING A DUTY ON PETITIONERS TO OBTAIN A STAY OF THE PRIOR CERTIFICATE ORDER AND IS UNSUPPORTED BY SUBSTANTIAL EVIDENCE IN FINDING THAT INTERIM RELIEF WOULD HAVE BEEN GRANTED, OR, IF GRANTED, EFFECTIVE.

The Court of Appeals stated (335 F. (2d) at p. 1018; Petition in No. 671, p. 31a) that "the producers' plight was not brought about by the failure of the petitioning intervenors to obtain a stay, but came from the action of the producers in making the deliveries under certificates which, though final, were then under direct judicial

attack * * * " and that it "was up to them [the producers] to seek interim protective relief from the Commission, and there is no indication that extensions of time or other appropriate relief would have been declined by the Commission".

These holdings are not supported by evidence, overlook the provisions of Section 19(c) of the Natural Gas Act (15 U.S.C.A. Section 717r)[7] and place, retroactively, a burden upon the producers not warranted by the law or the practicalities of the situation. There was no "interim protective relief" practically available to the producers as successful applicants for certificates. A delay from the Commission for accepting the certificate until final judicial determination would have imposed irreparable injury on both producer and consumer for the gas would not yet be moving in the pipe lines, the cities of the North and East might have had chill houses over several cold winters and the producers might have lost their leases. In view of the pipelines' need for the gas, it is doubtful that the Commission would have granted any delay of performance to a successful applicant. The only parties who might have obtained interim protective relief were the distributor-intervenors, and, for obvious reasons, they did not choose to act.

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[7] See *infra*, p. 5a.

CONCLUSION

For all of the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Being excerpts from the Natural Gas Act, as amended (15 U.S.C. § 717a, *et seq.*) :

> Sec. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.
>
> (b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.
>
> (c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by the natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the

proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [15 U.S.C. § 717c]

Sec. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall

fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates. [15 U.S.C. § 717d(a)]

* * * * *

Sec. 7: * * *

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: * * *

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: * * * [15 U.S.C. § 717f(c)]

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified appli-

cant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [15 U.S.C. § 717f (e)]

* * * * *

Sec. 19: * * *

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. [15 U.S.C. § 717r(c)]